No. 14734

United States
COURT OF APPEALS
for the Ninth Circuit

ALBERT A. ARVIDSON, et al., *Appellants,*

vs.

REYNOLDS METALS COMPANY, a corporation, *Appellee.*
W. J. WHITEAKER, et al., *Appellants,*

vs.

REYNOLDS METALS COMPANY, a corporation, *Appellee.*

Appeals from Final Judgments of the District Court for the Western District of Washington, Southern Division.
HON. GEORGE H. BOLDT, Judge.

APPELLANTS' REPLY BRIEF

SCHAFER, CRONAN & NELSON,
JAMES P. CRONAN, JR.,
803 Public Service Bldg.,
Portland, Oregon.
PAUL M. REEDER,
Commercial Bldg.,
Hillsboro, Oregon.
Attorneys for Appellants.

Of Counsel for Appellants:
EISENHOWER, HUNTER, RAMSDELL & DUNCAN,
Puget Sound Bank Bldg.,
Tacoma, Washington.

KING, MILLER, ANDERSON, NASH & YERKE,
FREDRIC A. YERKE, JR.,
926 American Bank Bldg.,
Portland, Oregon
W. TOBIN LENNON,
Reynolds Metals Bldg.,
Richmond, Va.,
Attorneys for Appellee.

Of Counsel for Appellee:
HENDERSON, CARNAHAN, THOMPSON & GORDON,
Puget Sound Bank Bldg.,
Tacoma, Washington.
WALTER L. RICE,
Reynolds Metals Bldg.,
Richmond, Va.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8-55

No. 14734

United States
COURT OF APPEALS
for the Ninth Circuit

ALBERT A. ARVIDSON, et al.,
Appellants,

vs.

REYNOLDS METALS COMPANY, a corporation,
Appellee.

W. J. WHITEAKER, et al.,
Appellants,

vs.

REYNOLDS METALS COMPANY, a corporation,
Appellee.

APPELLANTS' REPLY BRIEF

Appeals from Final Judgments of the District Court for the Western District of Washington, Southern Division.

HON. GEORGE H. BOLDT, Judge.

STATEMENT

The purpose of this statement is twofold. First, we wish to point out to the Court that appellee, by ignoring our argument addressed to the matter, has apparently conceded that the trial Court adopted two erroneous "factual" bases for its written decision. Second, we want to point out that appellee evidently believes that

all, we merely want to show the Court that appellee has carefully selected only those most favorable elements of the proceedings below which tend to support the findings entered. This is consistent with appellee's idea of the scope of review, but it eliminates all of the evidence which might tend to show that a mistake was made below.

REPLY TO APPELLEE'S POINT I

Appellee's first point is that fluorides in particulate form emanating from appellee's plants did not settle upon appellants' farms, but even if they did, this Court should review the evidence, decide that appellee's operations are more important than appellants' and therefore refuse a remand to the trial Court. In support of the first part of this argument, appellee deals with the Arvidson and Whiteaker actions separately. As to the former it contends that the best evidence as to whether or not any fluorides were deposited upon appellants' properties is vegetation samples taken *on those properties*. On page 17 of its brief appellee lists 22 vegetation samples so taken. All of those samples contained less than 25 parts per million (ppm) fluorine. Because Mr. Zeh, appellee's chief chemist, testified that normal values could run as high as 20-25 ppm, appellee wants this Court to conclude that appellee deposited no fluorine on the Arvidson appellants' farms at any time. On page 19 of its brief, appellee attempts to buttress this conclusion by listing 12 urine samples, all of which are claimed to be normal.

What the urine samples have to do with the problem as to whether the fluorides deposited were in solid form

or not we do not understand. The sampling did not purport to establish that. It did not purport to establish it as to the 22 samples on page 17 either. What appellee is really saying is that since the vegetation and urine samples referred to were less than "normal", it makes no difference whether or not they were solids. With that out of the way, the real trouble with appellee's argument is that of the 22 vegetation samples on page 17, all (except the five Stauffer samples which were taken November 12, 1953) were taken in the last week of October, 1953. The lawsuit was filed December 6, 1950, and the trial started November 4, 1953. With a two-year statute of limitations having been held applicable, appellee therefore wants this Court to rule whether or not solids were deposited by its Troutdale operations solely on the basis of one week's testing. It explains (Ap. Br. 20-21) that its own hundreds of forage results taken during the entire period of the lawsuit should not be considered by this Court because, although Mr. Zeh, its chemist, said those results were comparable to results that would have been obtained on the farms if the distances between the two were reasonable, he did not go further in his testimony and state what distance was "reasonable".

There are a good many reasons why appellee's forage results obtained at places other than on appellants' farms should be considered by this Court in determining whether or not a trespass was made out. In the first place, the results were compiled in Exhibit No. 1285 which appellee prepared for trial and which was received in evidence by agreement. Secondly, the results were agreed upon in the pretrial order. Third, the stations

themselves were selected by agreement for use at the trial for the very reason that they bracketed appellants' farms (Ap. Br. 21). Finally, when Mr. Zeh was first asked whether, if the results taken on locations not on plaintiffs' farms had been obtained on the farms the results would have been comparable, the Court required the question to be answered and stated that it was a "good question" (III-64). The question was answered in the affirmative (III-66). Now appellee, having helped to select the stations on which the results are based and having used them at the trial, wants to exclude this Court's consideration of them.

After making the argument just referred to, appellee goes on at page 21 of its brief to contend that even if the testing station samples were of some significance it is impossible to determine on what farms the fluorides settled or whether they were in particulate or gaseous form. In the Whiteaker action appellee makes the same argument except that it admits that on the Rawnsley and Whiteaker farms some of the samples contained an above-normal amount of fluorine (Ap. Br. 22). Similarly to the argument advanced in the Arvidson action, appellee eliminates the possibility of any above-normal amounts of fluorine being deposited upon the Goldsmith and Josephson farms by excluding the results it obtained at a testing station about a mile from those farms and the Rawnsley farm (I-169-172).

Not only does appellee urge that only the testing results obtained on the farms are material in determining whether particulates were deposited as a result of ap-

pellee's activities, it also ignores completely the argument contained on pages 16-18 of our brief showing that solids were in fact deposited upon the farms. In that portion of our brief, we pointed out that since there was no question but that 90% of the fluorides which got out of the plants were solids, and that, accordingly, 90% of the test results (not limited to those from appellants' farms) established the deposit of solids. Appellee also ignores our review of Dr. Caldwell's testimony (Br. 17, 18) to the effect that *all* fluorides arriving at the farms were in solid form. Dr. Caldwell's testimony is the only testimony as to the form of the fluorides arriving at the farms *as distinguished from the form of fluorides getting out of the plants*. Dr. Caldwell's testimony was uncontradicted and appellee does not urge that he was impeached in any way. It just ignores his testimony.

The final portion of appellee's first point is to the effect that, even if this Court holds that trespasses were made out, remands are not warranted because upon balancing conveniences which *this Court* is asked to do, no injunctive relief would be in order anyway. An Am. Jur. reference relying on an 1889 Alabama case is cited for the proposition that injunctions against trespasses are sometimes refused. *Minto v. Salem Water L. & T. Co.* (1926), 120 Or. 202, 219, 250 Pac. 722, is also cited for the proposition that harm to the public is sufficient reason for denying injunctive relief. Ap. Br. 24.

These are questions for decision by the trial Court after this Court holds that trespasses in the actions were made out. The relative convenience to the parties and

the convenience to the public are matters which the trial Court should pass on first and not this Court. The 28 Am. Jur. reference at the top of page 24 of appellee's brief makes this very clear. Whether appellants would be greatly benefited by injunctive relief or whether appellee would be greatly inconvenienced are matters for the trial Court. So far the trial Court has merely decided that trespasses were not made out. What it would do if trespasses were made out is something it ought to be allowed to decide for itself rather than have the matter decided by this Court.

REPLY TO APPELLEE'S POINT II

In our brief, instead of analyzing all of appellants' damage claims, we picked out eight of them in the two cases for the purpose of demonstrating that the trial Court had made a mistake in finding in both cases that the cattle were not injured. Within the meaning of the *McAllister* case we sought to show that a mistake had been made. In so doing we were not trying to make representative actions out of the cases as appellee seems to contend on page 29 of its brief. We are merely trying to show that the cattle were hurt.

In trying to show that the cattle were hurt, we reviewed (Br. 29-51) in considerable detail what the eight farmers said was wrong with their cows. The farmers had lived with the cows for years and we felt that what they actually observed was of considerable significance. We then (Br. 52-57) summarized those complaints to show that the differences in the farmers' complaints were

ones of degree and not of kind. To buttress the farmers' observations we then pointed out (Br. 57-62) that the more fluorine the cattle were exposed to the less milk was produced and vice versa. We showed that the physical facts, including the documentary evidence, supported that argument without question (Br. 60-62). We then reviewed the experts for appellants and finally concluded on the damage feature of the cases that appellee's defense at the trial was based solely and exclusively on admittedly incomplete experiments of Drs. Phillips and Schmidt and three veterinarians. We pointed out that the three veterinarians had done no experimental work relating fluorine intake to butterfat loss. We pointed out also that the three veterinarians nevertheless took the position that there couldn't have been any butterfat loss because the degree of tooth damage was too slight to warrant it. We concluded that in taking this position the veterinarians were obviously relying upon the incomplete experimental work of Drs. Phillips and Schmidt (Br. 76-77).

Probably the principal point urged by us in contending that appellants' cattle really were damaged was that the physical facts, including the documentary evidence, led irresistibly to that conclusion. In other words, our principal contention in support of the lost milk point was that the more fluorine the cattle got the less milk they produced and vice versa. Two of our principal illustrations of that argument were the production performance on the Rawnsley and Whiteaker farms. Our argument with respect to those two farms was as follows:

"We pointed out in Section III(a) above that in the fiscal year 12/1/48 - 11/30/49 the Rawnsley farm, as shown by the D.H.I.A. record book, produced 430 pounds B.F. on the average. Over six months before that year began, the herd stopped eating anything that could have been contaminated (VI-1167). Not until four months after that test year began did it consume home grown feed again (VI-1169). *Prior* to that year it consumed home grown feed and produced less and *after* that year it steadily declined (Sec. III(a)). The greatest *rate* of decline after the year 12/1/48 - 11/30/49 was in the year 12/1/52 - 11/30/53, (Sec. III(a)) and in that year appellee emitted 80% more fluorides than previously because it had expanded its production (VII-1673). This production performance is based on the physical facts alone, as shown by Mr. Rawnsley's testimony as to where the cattle were and what they ate." (Br. p. 60.)

"The physical facts as to Whiteaker (Sec. (a) above) are that at Kalama, 10 miles from Reynolds, the herd average gradually increased from 345.2 butterfat for the year 5/1/45 - 4/30/46 to 357 butterfate for the year 5/1/46 - 4/1/47. The rate of increase went up at Kalama in the next year ending 4/30/48 *when the Reynolds plant was closed* and was 373.9. Then the herd moved next door to Reynolds *and* the plant *reopened*. There was an immediate decline of over 15% to 317. Except for the year 5/1/51 - 4/30/52, the herd production has stayed about that level. In the year just mentioned it went up from 307 to 335. It isn't hard to find the reason for that either. Mr. Whiteaker testified that starting in October, 1951, there was a substantial infusion of new blood in the herd (VI-1506, 7). When Reynolds substantially increased its production in the fall of 1952, thereby materially increasing the fluorides on the Whiteaker's grass, there was a decrease of 10% to 303 for the year 5/1/52 - 4/30/53 though only one-half of that year was affected by

the increased fluorides (August 1952 - April 1953). 303 was the lowest the herd ever produced." (Br. p. 61.)

At two places in its brief appellee attempts to answer the above argument as to Rawnsley. On page 66 it says:

> "The production record of the Rawnsley herd is such that it cannot be reconciled with a claim that operation of the plant injured the animals. In 1949, the herd enjoyed the highest production in the county for Dairy Herd Improvement Association herds over 40 cows (R-VI-1236, 1241). Part of the herd was pictured on the cover of the 1950 annual report of the Cowlitz County Dairy Herd Improvement Association high producers for the year 1950. 10 were similarly cited for the year 1951, 9 for the year 1952, and 13 for the year 1953 (R-VI-1250-1252)."

On page 80 it says:

> "No pot line was operating at the Longview plant from June 5, 1947, to March 11, 1948 (R-I-147-148). The milk production of the Rawnsley herd during a portion of this period (from December 1, 1947, to November 30, 1948) averaged 364.7 pounds of butterfat per cow. The first year that records were being kept of production of this herd and during which the plant was in operation all the time ran from December 1, 1948, to November 30, 1949. The herd reached its highest production during this test year (Appellants' Brief p. 58). This production was the highest in Cowlitz County for a Dairy Herd Improvement Association herd of over 40 cows (R-VI-1236, 1241). This production was obtained during a period when the fume collection system had not been finally installed. The last fan and wash tower were placed in operation on May 14, 1949 (R-I-151). In the years that followed, as the amount of fluorides emanating from the plant decreased, the production of this herd also decreased,

> instead of increased. Obviously, a causal relationship between the operation of the plant and the condition of the cattle does not exist."

The above two extracts from appellee's brief, particularly the latter one, represent a rather astonishing parade of half truths. Let us review this matter once more. As appellee says, the Longview plant was closed June 5, 1947, to March 11, 1948. There are three pot lines at the plant. The first reopened March 11, 1948. The second reopened March 25, 1948. Not until June 18, 1948, was the third pot line running. On May 24, 1948, Mr. Rawnsley took his cows well out of the area because of flood conditions from the Columbia River (VI-1167). Not until April 1, 1949, did they again consume any feed which could have been contaminated by appellee's operation. Thus, except for a two-week period when one-third of the plant was operating and an eight-week period when two-thirds of the plant was operating, the herd might as well have been in the Imperial Valley for nearly two consecutive years in so far as appellee's operations or the possibility of harm therefrom was concerned. Despite these undeniable facts, appellee wants this Court to conclude from the "facts" it sets forth that when the plant was running the cattle produced more than when it was closed. It elaborates on this argument by pointing out that the control system was finally completed on May 14, 1949, and "* * * In the years that followed, as the amount of fluorides emanating from the plant decreased, the production of this herd also decreased, instead of increased * * *." We have just pointed out that when the herd obtained its highest production, that is,

in the year ending November 30, 1949, it had, except for the 10-weeks period in the spring of 1948 and the period after April 1, 1949, been off fluorine completely since June 5, 1947, a period of two and one-half years. Thereafter the production steadily declined and the greatest *rate* of decline was in the year December 1, 1952, to November 30, 1953. In that year appellee emitted 80% more fluorides than previously because it had expanded its production. As pointed out on page 14 of our brief, this expanded production meant an increase in escaping fluorides from 250 pounds per day to 450 pounds per day.

As to our above-quoted argument relating fluorine intake to milk production on the Whiteaker farm, appellee has no direct answer. The closest it gets is Dr. Garlick's views as quoted in its brief on pages 78-79:

> "(1) WHITEAKER. As noted previously, Dr. Garlick did not discover any animals in this herd which had been injured by fluorosis. He visited the farm on July 11, 1951. Prior to doing so, he examined the herd's Dairy Herd Improvement Association production records. From this examination and said visit, he concluded (R-VII-1917-1922):
>
> 1. The primary problem was sterility;
> 2. Several animals were suffering from hoof rot;
> 3. Several heifers were barren;
> 4. One cow had a pronounced endocrine imbalance;
> 5. Three cows were 14 years of age or over and too old for production; and
> 6. Culling of marginal producers had been neglected."

We pointed out on pages 80-82 of our brief in detail that, Dr. Garlick to the contrary notwithstanding, it is still

perfectly clear that the only variable in the Whiteaker's milk production history is the variable supplied by varying amounts of fluorine. Not only does appellee not answer that, it does not in any way touch upon our discussion of Dr. Garlick's views.

We take it that there is no question, really, but that milk production did vary on appellants' farms in accordance with fluorine consumed, particularly in the Rawnsley and Whiteaker instances. Fairly read, as we have just pointed out, there is nothing in appellee's brief which would lead this Court to any other conclusion.

The rest of appellee's Point II may be dealt with briefly. A 40-page section (Ap. Br. 30-70) deals with the argument that appellants failed to sustain the burden of proving that their cattle were injured. Pages 70-82 is to the point that in any event the proximate cause of the injury was not appellee's operation of the plant. Finally, appellee's brief (82-90) contains a series of nuisance cases to the effect that even if appellee's operation of the plants was the proximate cause of the cattle injury, no damages may be awarded because the utility of appellee's operations outweighs the gravity of the harm to appellants.

Perhaps the last point just mentioned should be discussed first. Appellee's supposed rule applies to injunctive relief, not damages (p. 7 this brief). In any event appellants are now contending and were contending in the trial Court appellee was trespassing. So much for that.

This brings us back to appellee's 40-page argument that the cattle weren't injured. In support of this, appellee points out that Drs. Phillips and Schmidt conducted experiments with sodium fluoride running up to 75 parts per million and that the cattle subjected to that level were not injured. Since that testimony, plus the observation of appellee's three veterinarians was the only defense offered at the trial, we anticipated that this defense would be briefed by appellee and answered it on pages 75-86 of our brief. It is too long to summarize here and we therefore ask the Court to re-read that section.

Appellee's detailed review of all of the claims, leaves out in each case the fact previously referred to that many samples were taken by appellee and others at points not on appellants' farms. Appellee ignores those results. Concerning the Baker claim (Ap. Br. top p. 45) appellee urges there was no appreciable variation in milk production. This, of course, overlooks the fact that Rex Ross, appellants' cattle expert, stated that production on the farms, including the Baker farm, should have been under normal conditions a lot higher than it was. Moreover, Dr. A. O. Shaw testified that adequate amounts of feed were supplied to maintain the production contended for. As to the Robson claim, appellee is at pains (p. 54) to point out that his income increased 50% during the years for which claim was made. A similar claim is made with respect to Mr. Hester (p. 49) and Mr. Ford (p. 48). This argument was anticipated and answered in the last paragraph on page 9 of our brief.

Appellee's curious habit of making statements in an answering brief, without reference as to what has already

been said in the opening brief, appears again in the discussion of the Seekins production on page 55. There appellee urges that in his deposition Mr. Seekins testified that his production was just what appellants' cattle expert said at the trial it ought to be be. In our brief in the first full paragraph on page 48 we noted that Mr. Seekins testified at the trial that he wasn't trying to say in his deposition what his production was—he was saying what it ought to be. Similarly, appellee's argument with respect to Mr. Stauffer's culling starting in the last paragraph on page 56 of its brief was answered in the paragraph beginning at the bottom of page 50 of our brief.

Appellee urges that the Whiteaker cattle weren't injured, relying primarily upon the fact that the Phillips-Schmidt experimental levels were higher than the fluoride sample results obtained on the farms in the Whiteaker action. The soundness of this, of course, depends upon ignoring all of the considerations we urged in our brief leading to the conclusion the cattle were injured. It is probably worth adding, with respect to the Goldsmith claim, that appellee urges (p. 68) there was no butterfat loss because the production went up each year except for the last year. However, the decline in the last year was 25% which was the same year (as previously pointed out) that appellee's fluoride emanations increased by 80% or from 250 to 450 pounds per day.

Appellee finally claims that even though appellants' cattle were injured, appellee's activities were not the proximate cause thereof. This is developed at some length on pages 70-82 of appellee's brief. Two points are

probably worth answering: Appellee repeatedly refers to *presence* of disease as indicative of a *history* of disease. Of course, the choice of the word "history" indicates that the disease in question was a problem that was continuing on these farms all the time, or substantially so. The fact of the matter of course, is that except for Mr. Josephson, who really did have a Bangs disease problem in 1952, the other appellants suffered no more than the usual incidents of ordinary diseases in their cattle. Our brief pointed this out at pp. 8-9. The other matter probably worth mentioning is appellee's contention with respect to six of appellants that they were really getting their fluorine from mineral supplements. The mineral supplements referred to ranged from a maximum of 1340 ppm fluorine to a minimum of 30 ppm. In view of the facts that there is no evidence in the record as to how much mineral supplements were consumed nor that mineral supplements ever caused fluorosis anywhere, this seems a pretty slender reed to lean on. It is, in fact, an obvious makeweight.

After contending in Point II of its brief that appellants' cattle weren't injured and that appellee's operations were not the proximate cause of any injury, appellee contends that a remand would not be justified anyway. The legal basis for this argument is that appellee was not creating a nuisance (Ap. Br. 82-89). This abstract proposition of law has nothing to do with appellants' theory. As pointed out earlier in this brief (p. 14) appellants are proceeding upon the theory of trespass. Appellee does not contend that if it was trespassing damages should not be awarded.

REPLY TO APPELLEE'S POINT III

In contending that the deposit of particulates upon Washington lands is not a trespass (for the purpose of the law of limitations), appellee relies as did the trial Court, upon the *Riblet, Weller* and *Suter* cases (Ap. Br. 94, 95, 97). We pointed out (Br. 90-93) that the first two of these cases were pleaded in nuisance and that the last was pleaded in negligence.

Appellee also relies upon the *Perrin* and *Fraser* cases decided in the same Court in which the present cases were decided. Both involved Oregon lands and thus Oregon substantive law. Moreover, as shown by Judge Leavy's opinion in the *Perrin* case (Ap. Br. 93-94), he was dealing with fumes, not solids.

Appellee also cites (p. 96) the *Sterrett* case. This was a nuisance case. The theory of the *Park* case relied upon by appellee (p. 96) does not appear from the opinion, but the opinion does show that smoke and fumes were involved, not solids.

In attempting to distinguish the Washington trespass cases, the text writers and Judge Fee's opinions on trespass (Br. 95-100), appellee's principal contention is: "* * * There is no indication that the rules stated therein are to be applied to the settling upon real properties of minute materials emanating from an industrial plant being lawfully operated." (Ap. Br. 104) We think the answer to this is, as stated on p. 93 of our brief, "* * * it is not lawful in Washington or anywhere else to deposit solids on another's real property."

By Point III, 2, of its brief appellee contends that the Washington two-year statute applies to appellants' personalty claims. No attention at all is given to our argument that while the three-year personalty limitations statute has been held inapplicable to certain "person or rights" cases, such holdings have never been applied to cases which, like the present ones, involve personal property (Br. 100, 104). We can add nothing to that argument here.

Appellee concludes its brief (p. 109) by contending that since no trespass was made out and since no damage was shown remand is unnecessary because moot. It seems obvious that even granting appellee's assumptions for the sake of argument, no one knows what the proof would show as to the missing third year.

Respectfully submitted,

SCHAFER, CRONAN & NELSON,
JAMES P. CRONAN, JR.,
PAUL M. REEDER,

Of Attorneys for Appellants.